APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 88
HCA/2017/000470/XC

Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD BRODIE

in

APPEAL AGAINST SENTENCE

by

ANDREW SINCLAIR

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: C Findlater; John Pryde & Co
Respondent: K Harper (sol adv) AD; Crown Agent

22 November 2017

[1] This is an appeal at the instance of Andrew Sinclair, who pled guilty at a first diet in the Sheriff Court in Aberdeen on 4 July 2017 to the second charge on the indictment, that being that on 10 October 2016 he was concerned in the supplying of cannabis resin, a Class B drug, in contravention of section 4(3)(b) of the Misuse of Drugs Act 1971. The charge was

aggravated by the appellant having committed the offence while on bail, having been granted bail on 14 September 2016.

[2] The sheriff adjourned sentencing for the purpose of the preparation of a Criminal Justice Social Work Report. On 31 July 2017 having heard a narrative of the circumstances from the Crown and a plea in mitigation on behalf of the appellant and having considered the Criminal Justice Social Work Report, the sheriff imposed a sentence of 33 months imprisonment of which sentence 6 months was imposed in respect that the offence was committed while the appellant was on bail, the sentence being discounted from what would otherwise have been a sentence of 42 months having regard to the guilty plea. The appellant now appeals on the grounds that the sheriff erred by the selection of a headline sentence which in the circumstances was too high. It is specifically accepted on his behalf that a custodial sentence was appropriate, it being acknowledged that the nature of the offence called for such a disposal.

[3] Mr Findlater appears for the appellant. In his previously lodged case and argument there are set out the circumstances of the offence and the personal circumstances of the appellant. In so far as relevant for present purposes these are as follows. The appellant pled guilty to a charge of, on one day, having been concerned in the suppling of cannabis resin, a Class B drug. On that day the appellant was driving a car on the A90 road when he was stopped by the police. A package was found in the boot of the car containing cannabis resin having a value of about £10,000 which had the potential to realise approximately £32,000 if subdivided into small street level deals. While the appellant had first indicated that the package contained brake pads, he very quickly confirmed that it in fact contained cannabis and was fully cooperative with the police thereafter including at interview when he made a full admission.

[4] The appellant's explanation for the offence was that he had a drug habit and had accrued a drug debt of almost £3,000. He was offered an opportunity to clear the debt by acting as a courier. He initially declined that offer. This resulted in the appellant having been physically assaulted and hospitalised. After further threats were made against both the appellant and his family he agreed to act as a courier. He was given the details of an address to drive to and had an item placed in the boot his car.

[5] The appellant is 30 years of age. He had been living with his mother and unemployed at the date of sentencing. He has four children. He presently has no contact with the eldest child. The other three children are from a longstanding relationship which has now ended. When at liberty he was maintaining regular contact with these three children. While unemployed at the time of sentencing he has a history of employment as a trained plasterer. The appellant has a schedule of previous convictions but Mr Findlater submitted that the schedule was of limited significance. The majority of the appellant's previous convictions are for road traffic matters. He has two convictions for theft, two for assault and a police fixed penalty in respect of breach of the peace. The appellant has no previous convictions for drug matters. The appellant had never previously received a custodial sentence, mostly having received financial penalties for his offending. The only other disposals noted in his schedule of previous convictions are a community service order for theft imposed in 2005 and an admonishment for two assaults in 2011. While the police fixed penalty notice was issued in 2015, the most recent court conviction was recorded in 2012.

[6] At paragraph [16] of his report the sheriff states:

> "I suggest that a six month sentence of imprisonment for failure to appear on indictment is not an excessive sentence and that a sentence for contravening section

> 4(3)(b) of the Misuse of Drugs Act 1971 of effectively 27 months is not excessive either."

In his case and argument Mr Findlater criticised that statement as inaccurate in two respects: (1) there has been no failure to appear and (2) that the sheriff actually imposed a 36 month sentence for the substantive offence with the remaining 6 months of the 42 month headline being attributable to the bail aggravation. We take both of Mr Findlater's criticisms to be well made, noting that, as appears from the minute, while the sheriff discounted the element of 36 months (by 25%) in respect of the guilty plea he did not discount the element of 6 months attributable to the aggravation. No point is taken in relation to discount but, as Mr Findlater indicated, what is in issue is whether a 36 month sentence is an excessive sentence in the circumstances of the present case.

[7] While relying on everything which might be regarded as a mitigating factor Mr Findlater developed his submissions that the headline of 36 months was excessive by reference to two principal considerations: first, the sheriff having misdirected himself by his reliance on the decisions which he refers to in his report, *HMA* v *McFadyen* [2012] HCJAC 73, *Geddes* v *HMA* 2003 GWD 8-211, *Hutchison* v *HMA* 2001 GWD 26-1041, and *Marshall* v *HMA* GWD 1-10; and, second, the result of using the English Sentencing Council *Drugs Offences Definitive Guidelines* as a cross-check.

[8] We accept Mr Findlater's submission that the degree of culpability in the case of *HM Advocate* v *McFadyen* [2012] HCJAC 73, which is one of the cases referred by to the sheriff was clearly higher than in the present case. We also see force in the criticism that the reports in the other cases, which are taken from Greens Weekly Digest, are too brief to be of more than limited assistance.

[9] As Mr Findlater explained, the English *Definitive Guidelines* propose a step by step process by which one can arrive at a range of possible sentences and then find an

appropriate sentence within that range. Mr Findlater submits that the result of following that process is to produce a category range in a case such as the present of between 26 weeks' and 3 years custody with a starting figure of 12 months. While we accept that Mr Findlater would appear to have applied the English *Guidelines* correctly, we do not see a starting point of 12 months in a case of this sort to be consistent with Scottish practice. Mr Findlater was unable to point to any Scottish authority in which the English *Guidelines* had been used in respect of a case of contravention of the Misuse of Drugs Act 1971. Subject to a qualification to which we will come, we see it as being difficult to say that 36 months imprisonment is an excessive sentence for being concerned in the supplying of Class B drugs with a value of at least £10,000, albeit only on one day and albeit where the offender has no analogous previous convictions.

[10] The qualification is this. An important, albeit not uncommon, feature of the present case is the appellant's explanation that he only became involved in the offence due to coercion (in this case that coercion having gone the distance of an assault in which his ankle was deliberately broken and a threat was directed at his family) associated with a drug debt. At paragraph [12] of his report the sheriff notes that the appellant did not seek to explain why he had not taken the step of reporting these threats to the authorities. That formulation may indicate a degree of scepticism on the part of the sheriff, but we do not see there to have been a direct challenge to the appellant's veracity in the matter, either by the Crown or by the sheriff. Irrespective of the position adopted by the Crown, it would have been open to the sheriff to explain that he was not prepared to accept what was put forward on behalf of the appellant and to insist on a proof in mitigation if the appellant's explanation was to be adhered to (see *Ross* v *HM Advocate* 2015 JC 271). He did not do that. Accordingly we consider what was put forward on behalf of the appellant as having to be taken as having

been true. As was said in *McCartney* v *HM Advocate* 1998 SLT 160 at 162, as a general rule the court will accept what is said in mitigation in the absence of any specific contradiction by the Crown. We understand that the Crown may not be in a position either to confirm or to deny an account given by or on behalf of an offender by way of mitigation but, as a matter of fairness, the court cannot ignore such an account without affording the offender the opportunity of proof of what he claims to have been the case, unless it is "so manifestly absurd that it can be disregarded", to use the language of Lord Sutherland in *McCartney* at 162D.

[11] Determining the extent to which the fact that an offender has been coerced into committing an offence where the circumstances are not such as to afford him a defence to the charge should be taken into account when determining sentence is not without difficulty. The proper course when faced with such coercion is to report the matter to the police but courts have recognised that where that course is not followed the fact that the offender acted under coercion may sound in mitigation. That is reflected, for example, in the English *Guidelines*. Here, on the appellant's account, which we must accept, he was subject to quite severe pressure, including being seriously assaulted. We do not see that as a fact which is reflected in the sheriff's decision-making. Accordingly, we have been persuaded to quash the sentence imposed by the sheriff and substitute an alternative sentence. We shall adopt the structure which the sheriff adopted, that is we shall start with a headline sentence in respect of the substantive offence but we will fix that headline at 28 months rather than the 36 months adopted by the sheriff; we shall reduce that by 25%, which is the same discount applied by the sheriff, to produce a figure of 21 months; to that we will add an undiscounted element of 6 months in respect of the bail aggravation. The

result of that is to substitute for the sentence imposed by the sheriff a sentence of 27 months to run from the same date as that adopted by the sheriff.